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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SIMONE N. GAZAN,
Attorney for Petitioner,
One Broadway,
New York City.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.

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IN THE

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OCTOBER TERM, 1942.

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Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Margaret M. Brady, as Administratrix of the Estate of James P. Brady, deceased, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit entered on the 4th day of June, 1942 reversing a judgment for $22,760.00 in favor of Petitioner and against Respondent, as damages for the death by wrongful act of James P. Brady, and dismissing the complaint. This decision was upon the ground that the decedent's death, having resulted from a maritime tort, and this defendant being the opera-

tor of a government-owned merchant vessel, the exclusive remedy of plaintiff was against the United States under the Suits in Admiralty Act.

The decision was not unanimous. Judge Clark dissented in a vigorous and logical memorandum.

Brady v. Roosevelt S. S. Co., 128 Fed. (2d) 169.

The Circuit Court of Appeals entirely lost sight of the fact that the deceased, James P. Brady, was, at the time of his death, a Customs Inspector and a civil employee of the United States, and that his widow has accepted federal compensation (R. 342*). Therefore, his administratrix could not sue the United States under the Suits in Admiralty Act because all rights and remedies against his employer were waived when she elected to take, and accepted, compensation under the United States Employees' Compensation Act. His estate could not sue for damages.

Dahn v. Davis, 258 U. S. 421.

The decision that the United States should have been sued under the Suits in Admiralty Act is, therefore, utterly without force or effect.

Statement of the Case.

The United States, through the Maritime Commission, owned the merchant vessel "Unicoi". This vessel was one of a fleet which was operated under the trade-name of American Pioneer Line.

It was the intention of the Congress in passing the Merchant Marine Act of 1936 and in creating the Maritime

*Reference is to folios.

Commission, to establish an American merchant marine to engage in world-wide foreign commerce. The vessels were to be acquired by purchase or construction, and to be operated eventually by purchasers or charterers.

Title 46, U. S. C. A., § 1194, et sequi.

Pending a satisfactory sale or charter, it was provided that the Maritime Commission could have the vessels temporarily operated for it by "private operators".

Title 46, U. S. C. A., § 1194.

Acting upon this authority the Maritime Commission selected the Roosevelt Steamship Company as its "private operator" of the vessels of the American Pioneer Line, among which was the "Unicoi" (R. 86).

The contract between the Maritime Commission and the Roosevelt Steamship Company was in compliance with the above statute (R. 87) which required a "private operator", and consequently the contract designated the Roosevelt Steamship Company as the Managing Agent (R. 84). The contract recites (R. 89):

> "Whereas, the Managing Agent has indicated its willingness to undertake the *management and operation* of the Line. . . ." (Italics supplied.)

That part of the preamble definitely fixes the independent character of the operator, and it is emphasized by the following provisions (all italics supplied):

> A. "The owner hereby designates the Managing Agent as its Managing Agent to *manage, operate and conduct the business of the Line* . . . on behalf of the Owner . . . and under its supervision and direction" (R. 90).

B. "The Managing Agent shall *manage and operate* the said vessels under the trade name American Pioneer Line . . ." (R. 95).

C. "The Managing Agent agrees to *man, equip, victual, supply* and *operate* the vessels, subject to such restrictions and in such manner as the owner may prescribe . . ." (R. 99).

D. "The Managing Agent agrees to *conduct its operations* with respect to the vessels . . . in full compliance with applicable provisions of law, and particularly the Act, . . . and with due regard to *wage and manning scales* . . ." (R. 101).

E. "The Managing Agent shall . . . exercise reasonable care and diligence to maintain the vessels in a *thoroughly efficient state of repair*, covering . . . *tackle* . . . *equipment* . . . and will effect *maintenance and voyage repairs and replacements* . . ." (R. 107).

F. "The Owner shall provide . . . hull, machinery and port risk insurance, and *the Managing Agent shall provide*, for the account of the Owner and subject to its approval, *Protection and Indemnity*, and such other forms of insurance as the Owner may deem necessary" (R. 111).

G. The Managing Agent is obligated to provide a bond "to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the Managing Agent contained in this agreement" in the amount of $80,000.00 (R. 115).

H. "Any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner . . ." (R. 123).

I. "The Owner may terminate the agreement if (a) A voluntary sale by the Managing Agent of this agreement, or any interest therein, or an assignment . . . whereby the management or operation of the above described Line or vessels shall be divested from the Managing Agent . . ." (R. 124).

This agreement was substantially a bare boat charter of the vessels to Roosevelt Steamship Line, the Owner retaining such supervision only as would tend to safeguard and protect its properties.

The steamship "Unicoi" docked in New York on the morning of July 9, 1938 and immediately put over a long ladder from ship side to dock. It was the duty of Brady, the Customs Inspector, to promptly go aboard that vessel in the performance of his duties. While ascending the ladder a defective and rotton rung gave way under his weight; he dropped to the next rung below, still holding on with his hands (R. 252). He obtained a new footing and continued on up, boarded the vessel (R. 300) and attended to his duties.

From internal injuries sustained when his body dropped as the rung broke, he died on July 20, 1938.

His widow, as administratrix, brought a common law action under the death statute of New York and, upon trial, recovered a judgment of $22,760.00.

The defendant never questioned, on appeal, the negligence which caused the accident, and the resulting death, nor was any attack made upon the amount of the verdict.

The defendant urged by motion before trial (R. 30) and also upon the trial (R. 348) the contention that the court did not have jurisdiction of the subject-matter, because the accident was a maritime tort; the Roosevelt Steamship Company was a mere agent of the United States operating the boat, not on its own behalf but on behalf of the United States; that any judgment recovered would be paid out of the Treasury of the United States and, therefore, the

sole remedy was against the United States under the Suits in Admiralty Act.

At the trial the defendant assumed, for the argument, that the Roosevelt Steamship Company did independently operate and control the vessel and employed the members of the crew (R. 348) but contended that the judgment would have to be paid by the United States and, therefore, under the doctrine of *Johnson* v. *Fleet Corporation*, 280 U. S. 320, the sole remedy was under the Suits in Admiralty Act.

Both the formal motion before trial and the procedural motion at the trial were denied.

The defendant appealed this jurisdictional question and the Circuit Court of Appeals, by a two to one decision, reversed the judgment and directed that the complaint be dismissed, stating that the sole remedy was against the United States under the Suits in Admiralty Act.

Petitioner (appellee below) now seeks certiorari to review that decision.

Jurisdiction.

The jurisdiction of this Court to entertain this petition and to grant the same, is provided by Section 347 of Title 28 of the United States Code.

Definitely involved are the following:

a. A construction of the Suits in Admiralty Act, and its application to an independent, private corporation operating a government owned merchant vessel under the mandate of the Merchant Marine Act of 1936 which specified that the operation was to be by private operators.

b. The effect of the Brady decision on the Federal Employees Compensation Act.* The Brady case holds that

*See Exhibit "A", annexed to the Petition.

any tort claim against the operator of a government merchant vessel must be against the United States in admiralty under the Suits in Admiralty Act. That Act provides that the final judgment must be paid by the United States (46 U. S. C. A., Sec. 748).

The Employees' Compensation Act (5 U. S. C. A., Sec. 776) provides for the assignment of claims against a "person other than the United States", thereby authorizing a suit by the United States or the Compensation Commission, or the personal representative of the deceased, against such third person to collect the damages recoverable for the tort. Does the Brady decision, holding that for maritime torts on a government vessel, the only party suable is the United States, nullify so much of the Compensation Act as authorizes a suit against a third party to recover damages? That Brady decision would require the United States, as assignee of its civil employee, to sue the United States, as vessel owner!! The tort feasor—the guilty party, with a liability bond to indemnify it, would go free!

The Questions Presented.

The Circuit Court of Appeals correctly held that, both under the contract and the general principles of law, the United States would not be bound, or required, to pay the judgment recovered against the agent, based upon the affirmative and active negligence of the agent.

Therefore, we need not concern ourselves with the case of *Johnson* v. *Fleet Corporation*, 280 U. S. 320, and its application to the testimony of Mr. Collins (R. 328) that the United States would have to pay the judgment, which was somewhat remarkable testimony in view of the express provision in the contract for the procurement of liability insurance by the agent to indemnify against loss or damage, and the fact that no attorney for the United States appeared in the case, which was defended only by the Roosevelt Steamship Company's attorneys.

The Circuit Court of Appeals held squarely that, since the tort was maritime, *ipso facto*, the sole remedy was under the Suits in Admiralty Act, if at the time the vessel was being operated "by or for the United States or such corporation".

Therefore, the questions which are presented by this petition are:

1. Where the Maritime Commission turns over government merchant vessels to a private operator, under statutory mandate, which operator becomes the Managing Agent charged with the duty to manage and operate the vessels; man, equip and supply them; keep the appliances and equipment in good order and repair and to provide P. & I. Insurance against personal injury and death claims, and such Managing Agent permits a ship's ladder to become defective, dangerous and unseaworthy so that, when placed from ship to dock, a rotten rung breaks when a Customs Inspector starts to ascend the ladder, and he sustains fatal injuries as a result of this maritime tort, can the administratrix of such deceased government employee sue the responsible Managing Agent at common law, under the state death statute, for damages due to its own negligence, even though the Managing Agent was operating the vessel for the United States, or does the Suits in Admiralty Act afford the exclusive remedy, since the death was attributable to a maritime tort?

2. Under the circumstances stated, would the Suits in Admiralty Act still afford the only remedy despite the fact that the widow of a civil employee of the United States has elected to take, and has actually accepted, the compensation provided by the Federal Employees' Compensation Act, and thereafter cannot sue his employer?

3. Does the bare fact that an independent agent, who operates a government merchant vessel for the United States, and who is guilty of a maritime tort which inflicts fatal injuries, *ipso facto* relegate such claimant exclusively to redress, if any, under the Suits in Admiralty Act, irre-

spective of the fact that the negligence is solely that of the agent, and such agent is personally liable for the resulting damages?

Opinions Below.

The plaintiff below relied on the case of *Quinn v. Southgate-Nelson Corporation*, 121 Fed. (2d) 190,* a decision by the Second Circuit. In that case Quinn was a government employee, working as a bridge-tender on a government bridge. The steamship "Waukegan" was government-owned but was operated by Southgate-Nelson as Managing Agent under an identical contract as that with Roosevelt Steamship Company. The Circuit Court held that Southgate-Nelson, under the contract, was an independent agent and, as such, was personally liable for its own negligence.

In its prevailing opinion in this Brady case the Circuit Court held that the Quinn case was distinguishable from the Brady case because Quinn was killed on a shore structure and, therefore, the tort was non-maritime, and the relevancy or applicability of the Suits in Admiralty Act was not before the court, because, since the tort happened on land structure, no suit in admiralty could be brought.

The majority held that Brady, having been injured by a maritime tort, his administratrix was relegated to a suit under the Suits in Admiralty Act, and that this provided the exclusive remedy against the United States or the Maritime Commission.

As to the contention of plaintiff below that where a private corporation is the contracting operator of a government-owned vessel, such private corporation is suable just the same as if there had been no Suits in Admiralty Act, the Circuit Court, while granting that neither the United States nor the Maritime Commission would be compelled to reimburse the agent for the damages it may pay for its own negligence, either under the contract or by

*Certiorari denied, 62 S. Ct. 185.

general principles of law, nevertheless decided that the fact no reimbursement would be made is not decisive under the Johnson case, 280 U. S. 320, for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. The Act was designed to prevent seizure of vessels owned by the government, or its wholly owned corporations. No distinction was made between seizures from a private operating corporation and from an operating corporation owned by the government.

(Petitioner does not appreciate this reasoning for the common law action seized nothing, and the judgment would be collected from the P. & I. insurance policy.)

The decision proceeds: The Suits in Admiralty Act provides that a vessel shall not be subject to arrest or seizure if, *inter alia*, it is operated "by or for the United States or such corporation" and, furthermore, under the Johnson decision, *supra*, it was held that "the remedies given by the Act are exclusive in all cases where a libel might be filed under it".

(Again Petitioner does not understand the reasoning because in the Brady case no vessel was seized and no libel could now be filed because the widow of Brady, a civil employee of the government, having accepted federal compensation, cannot now sue the United States in admiralty or at law.)

The Circuit Court quoted from the Johnson case opinion to the effect that there would be no uniformity of remedies if, putting the United States and the Fleet Corporation on the same footing, and providing an exclusive remedy in admiralty against them, if, also, suits under the Tucker Act and in the Court of Claims be allowed against the United States, and actions at law, in state and federal courts, "be allowed against the Fleet Corporation, or other agents, for the enforcement of maritime causes of action covered by the Act". The court then said that the words "or other agents" used above meant not just a government-owned corporation like the Fleet Corporation but included a Managing Agent like Roosevelt Steamship Com-

pany since the agent in the Johnson case, the Navigation Company, was just such an agent as in the Brady case. Therefore, the Johnson case controls the Brady case. Accordingly the judgment was reversed with directions to dismiss the complaint.

Circuit Judge Clark, in a dissenting opinion, adhered to the language of the Suits in Admiralty Act, particularly Section 2, which is limited to the "United States or such corporation," the reference being to a government-owned corporation. He did not agree that the words "other agents" stretched the Act to include other agents than governmental agents under the old operating agreements.

He did not see any distinction between the Quinn case, in which the bridge-tender was killed on the bridge, a non-maritime tort, and the Brady ship's ladder case, a maritime tort. He considered government liability as the test —if the government is liable to respond in damages then the remedy is against the government; if a private operator is liable for the damages, then the suit should be against the private operator.

Brady v. Roosevelt Steamship Co., 128 Fed. (2d) 169.

Reasons Relied on for Allowance of the Writ.

1. The Circuit Court of Appeals entirely overlooked the fact that the Petitioner (plaintiff below) could not bring any suit, in admiralty or at law, against the United States because the decedent was a civil employee of the government and his widow had accepted federal employee's compensation, although the Employees' Compensation Act sanctions a suit against a "person other than the United States".

2. The Circuit Court of Appeals entirely overlooked the fact that Roosevelt Steamship Company was an independent contractor, and personally liable for its negligence,

a similar situation to that in which that court had recently held that the agent was liable for its own tort.

Quinn v. Southgate-Nelson Corporation, 121 Fed. (2d) 190; certiorari denied, 62 S. Ct. 185.

3. The Circuit Court of Appeals sought to avoid the effect of its decision in the Quinn case, *supra*, by saying that the negligence in the Quinn case was not maritime, whereas the negligence which killed Brady was maritime. That is a distinction without a difference. If an independent contractor or agent is personally liable for its negligence, its liability exists regardless whether the negligence was on a bridge or a ship's ladder. The circumstance that Quinn suffered a land tort and Brady suffered a maritime tort is too artificial and unsubstantial to form the basis for a determination that Quinn may sue at law but Brady cannot. It is the negligence, the tort, the act of omission or of commission by the agent which creates the right of action. The circumstance that in one case the accident was ashore and in the other aboard a vessel, is immaterial in a case like this. Liability is the test. If the agent is personally liable he may be sued in any proper forum. Whether the injury was sustained on a ship's ladder or upon a shore structure is purely incidental, except in situations where, if maritime, and the United States is involved, suit must be in admiralty.

4. The Circuit Court of Appeals entirely overlooked the several decisions of this Court to the effect that an agent of the United States, guilty of a wrongful act which causes injury to another, is personally liable for the damages.

Sloan Shipyard v. Fleet Corporation, 258 U. S. 549;

Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381;

U. S. Shipping Board v. Harwood, 281 U. S. 519;

Reconstruction Finance v. Menihan, 312 U. S. 81.

5. The Circuit Court of Appeals overlooked the fact that the Merchant Marine Act of 1936 entirely changed the relationship which formerly existed between government-owned corporations, like the Fleet Corporation, and its operators, to one where, by statutory mandate, the operator was required to be a "private operator" who must man, equip and supply the vessel; keep its appliances in repair; do no wrong which may cause damage; give a protection and indemnity policy to the Owner and also a bond of $80,000.00 to indemnify the Owner against loss or damage. That, therefore, the old decisions like the Johnson case, 280 U. S. 320; the Rosenberg case, 276 U. S. 202 and the Shea case, 253 N. Y. 17 are obsolete and are no longer precedents.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.

Dated: New York, N. Y.,
July 27th, 1942.

Certificate.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

Exhibit "A".

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue, New York, N. Y.

Commissioners

Jewell W. Swofford
Chairman
John J. Keegan
Albert H. Ladner, Jr.

Wm. McCauley
Secretary

In reply refer to File No. 593831

Mr. Simone N. Gazan
Attorney at law
One Broadway
New York, New York

July 9, 1942

Re: Brady v. Roosevelt
Steamship Company

Dear Sir:

The United States Employees' Compensation Commission understands that Margaret M. Brady, plaintiff-appellee in the United States Circuit Court of Appeals for the Second Circuit, is seeking through your office to secure a review by the Supreme Court of the United States of an adverse judgment by the Circuit Court of Appeals for the Second Circuit, in her suit against the Roosevelt Steamship Company, Incorporated.

While this Commission is not a party to that suit, it is, nevertheless, interested in having the decision reviewed by the Supreme Court of the United States, as the same may affect action of this Commission in numerous other cases arising under the Federal Employees' Compensation Act.

We, therefore, trust that you may in some proper way make this fact known to the court in your Petition for Review of the decision of the Circuit Court of Appeals.

Very truly yours,

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION
By JEWELL W. SWOFFORD
Chairman

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

MARGARET M. BRADY, as Administratrix of the Estate of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Motions to Dismiss Properly Denied.

The defendant below moved, before trial, for a dismissal of the complaint for lack of jurisdiction over the subject-matter because,

a. Under the operating agreement between the Maritime Commission and Roosevelt Steamship Company, a Delaware corporation, as Managing Agent, the said agent did not possess or operate the vessel on its own behalf but on behalf of the United States of America, and, therefore the exclusive remedy was against the United States under the Suits in Admiralty Act (R. 50).

b. If any judgment should be recovered against Roosevelt Steamship Company the money required to

pay it would come from the United States Treasury, which would make the United States the real party in interest, and, under the decision in the Johnson case, 280 U. S. 320, suit should be against the United States under the Suits in Admiralty Act (R. 53).

This motion was denied (R. 209).

At the trial of the case the defendant renewed its said motion to dismiss for lack of jurisdiction but, in view of the decision in the Quinn case, urged only that the United States would have to pay any judgment against Roosevelt Steamship Company, and, therefore, the suit should have been in admiralty under the Suits in Admiralty Act (R. 348-350).

The attorney who made these motions was fully aware that the employment by the deceased as a United States Customs Inspector made him (and his administratrix) amenable to the Federal Employees' Compensation Act, and inasmuch as the widow had accepted compensation (R. 366) no suit could be brought against the United States, although the Act permits an action against the responsible third party.

Yet, he urgently and seriously argued, and the Circuit Court held, that the remedy was exclusively under the Suits in Admiralty Act, notwithstanding no such suit could possibly be maintained now.

However, we believe that the decision of the Circuit Court is unsound because neither premise upon which it rests finds factual support or legal precedent to sustain it.

Managing Agent Was Independently Liable.

Under the explicit language of the Act defining the ways and means of operation of the vessels until sale or charter is effected, the actual operation was to be entrusted to a "private operator". This was done. The United States owns no stock in the Roosevelt Steamship Company, a

Delaware corporation. We will not repeat here the provisions of the operating agreement (R. 84-129), liberally quoted in the Petition for Certiorari, which, not only establishes the independent character of the agent, but which imposes on the agent the obligation to fully manage, control and operate the vessel; provide the crew; make repairs; keep the ship's tools and appliances in a safe condition; to exercise due care to prevent loss or injury, and to procure liability insurance to indemnify it against damage suits.

These facts make such agent directly and personally liable for its own negligence (Quinn case, 121 Fed. [2d] 190), and suable at common law.

Panama Railroad v. Vasquez, 271 U. S. 557.

United States Will Not Have to Pay Judgment.

When the steamship "Waukegan" crashed into the bridge in Delaware, it not only killed Quinn but also another bridge-tender, Oakes. The attorney for the widow Oakes attempted to sue in admiralty, and filed a libel *in personam* against the United States and also against The Continental Insurance Company which had issued the P. & I. policy on that steamship.

The United States Attorney appeared in the Oakes case for the Government; Tompkins, Boal & Tompkins appeared for The Continental Insurance Company.

Oakes v. United States, et al., 35 Fed. Supp. 868.

In the Quinn case, against Southgate-Nelson Corporation, which did not name the United States as a party, Tompkins, Boal & Tompkins again appeared for the defendant, Southgate-Nelson.

Quinn v. Southgate-Nelson, 121 Fed. (2d) 190.

It is significant that the United States Attorney appeared for the United States in the Oakes suit (35 Fed. Supp. 868) but, although Mr. Collins, by affidavit (R. 59) and testimony (R. 328) insisted that the United States was vitally interested in this Brady case because the United States would have to pay any judgment against Roosevelt Steamship Company, it is passing strange that he, William E. Collins, District Counsel of the United States Maritime Commission and Special Assistant to the United States Attorney for the Southern District of New York (R. 56), did not appear herein as attorney to protect the interests of the United States in the litigation, but left the defense to the personal attorneys for the Roosevelt Steamship Company. Instead, he permitted himself to be used as a mere witness in an effort to protect Roosevelt Steamship Company, and its liability insurer, against a recovery of damages.

If it be true that the United States would be eventually liable to pay the judgment, the United States would have regularly appeared in the case, suggested its interest and invoked a ruling to protect itself.

The fact is, Mr. Collins to the contrary notwithstanding, that the liability insurer will pay the judgment.

The requirement in the contract for Protection and Indemnity Insurance (R. 111) was not an idle provision. It contemplated negligence by the agent which might eventuate in a judgment for damages and, should the agent be insolvent, the judgment would be collected from the insurance company.

New York Insurance Law, Sec. 167.

There is no legal obligation on the United States to reimburse the agent for damages paid as the result of its own negligence. If the United States should pay, it would be a mere gratuity.

Brady v. Roosevelt S. S. Co., 128 Fed. (2d) 169.

In the court below the appellant (defendant) cited the case of Admiral Oriental Line v. United States, 86 Fed. (2d) 201 (Second Circuit) (R. 179) which held that a General Freight Agent, forced to defend an action against it which grew out of regular acts performed within the scope of its principal's business, could recover the litigation expenses from the principal. That case simply gave recognition to the well-known principle that a sub-agent may recover expenses incurred in defending an unwarranted suit against it.

On the contrary, the same court had held that, as to an independent contractor, there could be no such recovery against the principal since the risks of the independent contractor's business are its own.

> Cory Bros. v. United States, 51 Fed. (2d) 1010 (10) (Second Circuit).

The Roosevelt Steamship Company, the independent contractor or agent, was in the performance of its own business of operating the vessel and of keeping its appliances in a safe and seaworthy condition. With that obligation went direct liability for its own negligence.

Therefore, since the Roosevelt Steamship Company was a free and independent agent, under the contract, and since the United States will not have to pay the judgment, and since the agent is legally liable for its own negligence in the performance or execution of its obligation under the contract, the Petitioner (plaintiff) was entitled to maintain the action at law against the Agent.

The decision of the Circuit Court of Appeals in this Brady case is clearly erroneous and, unless reversed, will deprive Petitioner of a substantial property right without due process. The right given in the decision to sue the United States in admiralty is an absolute nullity because it cannot now be done in this case because federal compensation has been accepted.

The Circuit Court misunderstood or misinterpreted the *Lustgarten* case (280 U. S. 320), that being the case referred to in its opinion as having happened on the steamship "Coelleda", which was "operated for it (the United States) by the Navigation Company as agent pursuant to an agreement made by the United States acting through the Shipping Board represented by the Fleet Corporation". The Circuit Court opinion said "Apparently the Navigation Company was, in all material respects, in the position of the Roosevelt S. S. Co., Inc. as the agent in this instance." There is not the slightest similarity. The Navigation Company agreement was one of the old forms and was strictly an agency for the Fleet Corporation agreeement. The contract with the Roosevelt Company was under a statute which required a "private operator".

In the Lustgarten case, the cause of action for indemnity had been dismissed by the trial court and the action proceeded for maintenance and cure, which was properly against the vessel's owner, under the maritime law. As to maintenance and cure the United States, as owner, was the right defendant (The Osceola, 189 U. S. 158). The issue of negligence was not in that case. The United States, as owner, had to pay. It was the only person to sue since maintenance and cure is a right flowing from the maritime contract between ship and seaman.

Pacific S. S. Co. v. *Peterson*, 278 U. S., at page 138.

Therefore, the Lustgarten case is not a precedent for the Brady decision because (a) in the Lustgarten case the operating company was not an independent agent like the Roosevelt Company; (b) in the Lustgarten case the maritime law made the owner of the vessel, the United States, liable for maintenance and cure, while in this case no contract, statute or law makes the owner liable for the torts of the Roosevelt Steamship Company; (c) Brady was not a seaman, and did not assert a claim against the vessel's owner; (d) the inclusion of "other agents" in

the Johnson (Lustgarten) opinion transcends the language of the Suits in Admiralty Act, and expands its coverage beyond its own restriction to "any vessel owned by, in the possession of or operated by or for the United States or any corporation in which the United States or its representatives own the entire outstanding capital stock."

The use of the words "other agents" was purely a slip of the pen, but when seized upon by the majority opinion in the Brady case, well, as the dissenting opinion naively put it, "We have our present problem."

The Brady decision is erroneous.

The Merchant Marine Act of 1936 Established a New Relationship With Operating Agents.

The Suits in Admiralty Act was passed in 1920 when government merchant vessels were operated by mere sub-agents, and the district courts were holding Fleet Corporation agreements to be agency contracts and its employees to be servants of the United States. These vessels were being seized and delayed by libels *in rem*, release obtainable only by giving bond, and the Congress remedied that situation by substituting the credit of the United States in lieu of its vessels.

But this Court, in the Sloan Shipyards case, 258 U. S. 549, decided that the Fleet Corporation, even if an agent, was personally liable for its own torts, and could be sued therefor.

Then in 1936 an entirely new plan for the operation of government-owned merchant vessels was devised. The Congress departed radically from the old Shipping Board and Fleet Corporation set-up, with their sub-agency operating agreements. It sidestepped the Suits in Admiralty Act of 1920, which had served its purpose as to government vessels "operated by or for" the United States or

the Fleet Corporation. Congress wanted no more admiralty suits; it had terminated the Shipping Board and it wanted less tort litigation. It established the Maritime Commission and directed that government merchant vessels be operaed by *private operators* on certain definite and established routes, and under prescribed trade names.

Title 46, U. S. C. A., § 1101.

Such operation was to continue until the Government could obtain a satisfactory purchaser or charterer. These contracts with the private operators expired by their own terms on June 29, 1937.

In anticipation that there might be a failure to sell or to charter, the Congress provided for a continuance of the private corporation as operators and made it mandatory on the Maritime Commission that said vessels "shall be *temporarily operated* by the Commission for its account *by private operators*" until such time and upon such operating agreements as the Commission shall deem advantageous.

Title 46, U. S. C. A., § 1194.

Consequently, the Suits in Admiralty Act, which was intended to prevent interference with ship sailings by libels *in rem*, under the old law and practice, cannot be invoked now when the Congress has entirely changed the relationship between the government-owner and the actual operator, by making a private corporation (no stock of which is owned by the United States) an independent contractor —designated in the contract as "Managing Agent"—to take phycical possession of its vessels and to "manage, operate and conduct the business of the Line" (R. 90); to "man, equip, victual, supply and operate the vessels" (R. 99); bound it to a "strict compliance with the minimum

manning scales and minimum wage scales" (R. 102), and obligated it to procure protection and indemnity insurance (R. 111).

Therefore, if such independent contractor, or its servants, should furnish defective appliances or unseaworthy equipment, or commit any negligence from which injury results, the injured party may hold the independent contractor, operating agent, personally liable for such negligence, even though contractually such agent was operating a government merchant vessel "for the United States".

In other words, the Merchant Marine Act of 1936, in directing the Maritime Commission to procure the operation of its vessels by "private operators", thereby superseded the Suits in Admiralty Act which contemplated a situation where *government-owned corporations* and not private independent contractors, operated the vessels.

Prior to this Court's decision in the Sloan Shipyards case (258 U. S. 549), the Suits in Admiralty Act furnished the exclusive remedy against the United States on all causes of action arising out of operation of its merchant vessels.

Shipping Board v. Rosenberg Bros., 276 U. S. 202;
Johnson v. Fleet Corporation, 280 U. S. 320.

By the Suits in Admiralty Act the United States waived its sovereign immunity and its provisions had to be strictly followed.

But the reason for that Act has now ceased to exist for neither the United States nor any corporation owned by it, operate its vessels. Third parties, private corporations, independent agents, operate them, and such agents are personally and directly liable for their own negligence.

The Administratrix has no Right of Action Against the United States.

Civil employees of the government if they accept compensation, cannot sue the government in personal injury or death cases. Once compensation is accepted by the widow the sole and exclusive remedy against the United States continues under the United States Employees' Compensation Act. This Act, however, does authorize a suit against a "person other than the United States".

Wood v. Ford Garage Co., 293 N. Y. Supp. 999.

Mrs. Brady, widow, has two children, Virginia, aged 15, and James, aged 20, at the date of their father's death. James, being over 18, was not entitled to any compensation and Virginia would be entitled only until she attained 18 years—a rather small sum.

These two children would be entitled to practically two-thirds of the $22,760.00 judgment and the widow to one-third, less her re-imbursement for the compensation theretofore received.

Let it not be thought, therefore, that this suit is prosecuted to repay the Compensation Commission for its payments. That consideration does not enter the case except as defendant's counsel sought to inject that matter into the case (R. 342-347) to prejudice the plaintiff before the jury.

Notwithstanding the widow took compensation, she has a claim for damages against the wrongdoer and her children have quite a substantial amount at stake, to wit, about $7,550.00 each. They have a legal right to collect these damages notwithstanding their mother has accepted compensation.

Doleman v. *Levine*, 295 U. S. 221.

The deceased, Brady, was a civil employee of the government and, therefore, the decision of the Circuit Court of Appeals holding that the Suits in Admiralty Act affords his administratrix the only remedy, is an empty and valueless determination, for there can be no indemnity suit against the United States on behalf of a civil employee, either at law or in admiralty, where there has been an election to take, and acceptance of, federal compensation.

Dahn v. Davis, 258 U. S. 421.

If the Brady decision stands then the private operator of a merchant vessel of the United States, under the contract before the Court, can, with impunity, negligently injure or kill immigration inspectors, public health doctors and customs agents who necessarily board such vessels. The ship's officers could negligently collide at sea with another government merchant vessel, damage it, or injure or kill the seamen; a vessel could ram piers and damage them; demolish bridges or sink lightships, and be immune to any kind of action.

Did the Suits in Admiralty Act contemplate any such immunity to a private operator, whether the tort be committed on land or upon navigable water?

The Suits in Admiralty Act is only available where, if the vessel had been privately owned, a libel in admiralty would lie. If the cause of action was non-maritime the Act could not be invoked, but that does not exclude a common law action if there is a party against whom a legal liability exists for the tort, even though the government owned the vessel. Mere government ownership of and by itself, isolated and alone, cannot defeat this plaintiff. If such government-owned vessel be turned over to a third party to operate as an independent agent, such agent may be sued at law, under the state death statute, for the consequences of its own, direct negligence.

Even Agents of Fleet Corporation Liable for Own Negligence.

The Fleet Corporation had an operating agreement with the Admiral-Oriental Line to operate government-owned vessels between China and our West Coast. The agent in China accepted certain freight for New York and issued a bill of lading for initial carriage on the steamship "President Madison", and it specified that the freight was to be transshipped at Seattle to a vessel of the American Line or the Luckenbach Line. However, the Agent breached its bill of lading by placing the freight on a vessel of a different line. This vessel was lost. The owner of the freight sued the United States which sought to implead the agent as a party. The same court which decided that Brady could not sue the agent for its negligence, held that the Admiral-Oriental Line could be impleaded because, notwithstanding its agency for the United States, it was personally liable for its negligence in violating the provisions of the bill of lading.

Blumenthal v. United States, 30 Fed. (2d) 247 (2) (Second Circuit).

In another case where the government-owned vessel was turned over to the New York & Cuba Mail Steamship Company under an operating agency agreement, the agent had its Chief Stevedore on Pier 16, Brooklyn. There were certain barges moored at the end of the pier, one of which, No. 20, was owned by a third party.

The steamship "Suwied", operated by the agent under the usual agreement, was attempting to dock at this Pier 16. The captain of the "Suwied" appreciated the danger to the barges should he attempt to dock, and he requested the Chief Stevedore to move them. This request was refused and the Chief Stevedore ordered the "Suwied" to dock. In so doing the barge No. 20 was damaged and its

owner sued the New York and Cuba Mail for the damages. This agent sought to cast the liability upon its principal, the United States, but the same Court which held that Brady, administratrix, could not sue Roosevelt Steamship Company for its negligence, held that the New York & Cuba Mail, the agent, was personally responsible for the negligent order of its employee, the Chief Stevedore. That was a maritime tort!

N. Y. & Cuba Mail v. United States, 12 Fed. (2d) 348 (Second Circuit).

CONCLUSION.

The Roosevelt Steamship Company, a private corporation, acted as Managing Agent of the Maritime Commission (United States) under a contract which imposed certain definite obligations not only to manage and operate vessels, but to exercise care to make repairs and to keep the appliances in a safe condition; and to man, equip and supply the vessels.

The Roosevelt Steamship Company became, in legal contemplation, the owner *pro hac vice* during the life of the contract.

Reed v. United States, 11 Wallace 601;
Leary v. United States, 14 Wallace 610;
The Barnstable, 181 U. S. 464;
The Del Norte, 119 Fed. 118.

Even though the licensed officers had to be approved by the Maritime Commission, nevertheless the agent was the owner *pro hac vice*.

The India, 14 Fed. 476;
The Bombay, 38 Fed. 512;
Hill v. Leeds, 149 Fed., at page 880.

No matter who hired the ship's licensed officers, they were the servants of the Managing Agent.

Hahlo v. Benedict, 216 Fed. 303 (2);
The Charlotte, 285 Fed. 84.

It was the negligence of these officers, servants of Roosevelt Steamship Company, which caused the death of Brady.

The Roosevelt Steamship Company is a private corporation and as such may be sued in state or federal courts.

United States ex rel. v. McCarl, 275 U. S. 1.

The decision of the Circuit Court of Appeals which denied this right and deprived Petitioner of a just and fair verdict, is contrary to law; it misinterprets the Suits in Admiralty Act; it misconstrues the Merchant Marine Act of 1936; it nullifies certain provisions of Employees' Compensation Act, and remits Petitioner to a non-existent remedy in admiralty, all amounting to a denial of due process.

The Writ should be granted.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.